LEONG PENG KHEONG & ANOR

v.

DAWNTREE PROPERTIES SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
AZMEL MAAMOR J
[SUIT NO: S6-22-12-2000]
18 NOVEMBER 2001

CIVIL PROCEDURE: *Striking out - Striking out application - Application under paras. (a), (b), (c) and (d) of r. 19(1) O. 18 Rules of the High Court 1980 stated in the conjunctive - Whether should be disjunctive - Whether inclusion of para (a) breached r. 19(2) with applicant having filed a statement of defence*

CIVIL PROCEDURE: *Appeal - Appeal from order of senior assistant registrar - Order that appellant file a fresh summons in respect of application under paras. (a), (b), (c) and (d) r. 19(1) of O. 18 Rules of the High Court 1980 as paras stated in the conjunctive - Whether appellant should abide by order instead of filing appeal - Pegasus Engineering Sdn Bhd v. Sambu (M) Sdn Bhd*

CIVIL PROCEDURE: *Striking out - Striking out application - Whether defendant lost its right to strike out plaintiffs' writ having entered unconditional appearance - Whether issue of locus standi raised warranted a conditional appearance - Whether exception in Wilkinson v. Barking Corporation applicable - Rules of the High Court, O. 18 r. 19(1)(a)*

CIVIL PROCEDURE: *Appearance - Application to strike out writ - Appearance entered for an application to strike out writ - Whether appearance should be conditional - Whether only if issue raised is on locus standi - Exception to general principle - Wilkinson v. Barking Corporation - Rules of the High Court 1980, O. 18 r. 19(1)(a), (b), (c), (d)*

The defendant filed an application ('the said application') before the senior assistant registrar ('SAR') to strike out the plaintiffs' writ of summons and statement of claim under O. 18 r. 19(1) of the Rules of the High Court 1980 ('RHC'). The plaintiffs raised a preliminary objection based on two grounds: (1) that the said application made under para. (a), (b), (c) and (d) of r. 19(1) was stated in the conjunctive and therefore did not comply with O. 18 r. 19(1); and (2) that the defendant lost its right to make the said application as the issue of *locus standi* raised by the defendant necessitated a conditional appearance whilst herein the defendant had entered an unconditional

appearance. The SAR allowed the first ground but dismissed the second ground. Also, the defendant was ordered to file a fresh application of the same. The defendant now appealed against the SAR's ruling on the first ground whilst the plaintiffs appealed against her ruling on the second ground.

Held:

[1] The defendant had included para (a) together with the other paras (b), (c) and (d) r. 19(1) of O. 18 RHC in the said application. As clearly stated in r. 19(2), no evidence shall be admissible in an application under para. (a). The defendant herein had not only filed an affidavit in support of the said application but also the statement of defence. Hence, the prohibition contained in r. 19(2) had been breached. Following the case of *Pegasus Engineering Sdn Bhd v. Sambu (M) Sdn Bhd*, the defendant should have filed a fresh summons in respect of the said application instead of filing this appeal against the order of the SAR. (p 606 c-d)

[2] The issue of *locus standi* concerns the jurisdiction of the court. Hence, it should fall under para (a) of r. 19(1) which deals with "reasonable cause of action". When para (a) is involved, r. 19(2) has to be invoked. Thus, an application under para (a) read together with r. 19(2) must be given different consideration from the other three paras in r. 19(1). In other words, if an application under O. 18 r. 19(1) RHC only involves para. (b) or (c) or (d), the applicant is not required to have entered a conditional appearance but if the application is in respect of para. (a) then by virtue of r. 19(2) the applicant must file a conditional appearance. The defendant herein had not only filed an unconditional appearance but had also filed the statement of defence. In addition, the said application was supported by an affidavit. (pp 606 h-i & 607 a-c)

[3] In light of the above, an applicant must enter a conditional appearance in an application to strike out a writ under O. 18 r. 19(1) RHC on the ground of jurisdiction. However, the existence of an exception to this general principle has been recognised in the Singapore case of *"The Avro International," "The Avro Adventure," "Avro International (Owners of)" v. Arabian Marine Bunkers Sales Co Ltd & Ano*r, *ie*, that notwithstanding the fact that an unconditional appearance has been entered, an application to strike out will be allowed where the court lacks the jurisdiction to entertain the claim as in *Wilkinson v. Barking Corporation.* The facts of this case showed that the said application did not come within the exception because the plaintiffs' assertion was a matter which the court

would have jurisdiction. With this ruling, it would no longer be open for the defendant to file afresh the said application as granted by the SAR. Thus, the ruling of the SAR to that extent was set aside. (pp 607 e-i & 608 e, f)

[Defendant's appeal dismissed with costs; plaintiffs' appeal allowed with costs.]

Case(s) referred to:

Alor Janggus Soon Seng Trading Sdn Bhd & Ors v. Sey Hoe Sdn Bhd & Ors [1995] 1 CLJ 461 ***(foll)***

Monatech (M) Sdn Bhd v. Jasa Keramat Sdn Bhd & Anor [1999] 4 MLJ 629 ***(refd)***

Pegasus Engineering Sdn Bhd v. Sambu (M) Sdn Bhd [1998] 3 CLJ 677 ***(foll)***

Sambu (M) Sdn Bhd v. Stone World Sdn Bhd [1990] 4 MLJ 129 ***(refd)***

"The Avro International", "The Avro Adventure", "Avro International" (Owners of) v. Arabian Marine Bunkers Sales Co Ltd & Anor [1988] 1 MLJ 147 ***(foll)***

YAM Tengku Iskandar ibni Almarhum Tengku Ahmad v. Majlis Perajaan Negeri Kelantan & Satu Lagi [1998] 1 CLJ Supp 416 ***(dist)***

Wilkinson v. Barking Corporation [1948] 1 KB 701 ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 18 r. 19(1)(a), (b), (c), (d), (2)

For the plaintiffs - TT Ng; M/s Kam Woon Wah
For the defendant - Lee Siew Kin; M/s Khaw & Partners

Reported by Usha Thiagarajah

JUDGMENT

Azmel Maamor J:

Under encl. 10 the defendant in this case applied before the learned senior assistant registrar to strike out the plaintiffs' writ of summons dated 7 January 2000 and the statement of claim under O. 18 r. 19 of the Rules of the High Court 1980. This application was made after the defendant had filed an unconditional appearance as well as its statement of defence.

At the commencement of the hearing of this application before the senior assistant registrar the counsel for the plaintiffs raised a preliminary objection based on two grounds namely:

1. That the application was not in compliance with the requirements of O. 18 r. 19(1) of the Rules of the High Court 1980; and

2. That the application was not in accordance with the principle as laid down in the case of *Alor Janggus Soon Seng Trading Sdn Bhd & Ors. v. Sey Hoe Sdn Bhd & Ors.* [1995] 1 CLJ 461 in that for an application under O. 18 r. 19(1) if the issue is on *locus standi* it is incumbent upon the applicant to file a conditional appearance and not an unconditional appearance as in this case.

In respect of the preliminary objection raised by the plaintiffs the learned senior assistant registrar came to the following rulings:

1. That the Defendant failed to comply with the requirements of O. 18 r. 19(1) in that the Defendant's application under r. 19(1)(a), (b), (c) and (d) should be made disjunctively and not conjunctively as done by the Defendant in this case.

2. That there is no provision which requires an appilcant to file a conditional appearance when raising the issue of *locus standi* under O. 18 r. 19(1) of the Rules of the High Court 1980.

Consequently, the learned senior assistant registrar held that the plaintiffs' 2nd preliminary objection be dismissed. However, she decided to allow the plaintiffs' 1st preliminary objection and ordered that the defendant's application be struck out with liberty to file afresh.

Against the ruling of the senior assistant registrar allowing the plaintiffs' 1st preliminary objection and striking out the defendant's application the defendant filed an appeal to the judge in chambers (encl. 13). The plaintiffs also appealed against the ruling of the senior assistant registrar, for rejecting the plaintiffs' 2nd preliminary objection (encl. 14).

I shall deal with the defendant's appeal first. It concerned mainly with the provision of O. 18 r. 19(1) which must be read together with r. 19(2). It reads as follows:

> 19(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or indorsement, of any writ in the action, or anything in any pleading or in the indorsement, on the ground that:
>
> (a) it discloses no reasonable cause of action or defence, as the case may be; or
>
> (b) it is scandalous or vexatious; or
>
> (c) it may prejudice, embarrass or delay the fair trial of the action; or
>
> (d) it is otherwise an abuse of the process of the Court;
>
> and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.
>
> (2) No evidence shall be admissible on an appilcation under paragraph (1)(a).

There have been several decisions on this issue. I only need to refer to the case of *Pegasus Engineering Sdn. Bhd. v. Sambu (M) Sdn. Bhd.* [1998] 3 CLJ 677 since the issue raised in that case is quite similar to the instant case before me. I only need to quote the holding of the Court of Appeal as stated in the headnotes:

> The whole process of appealing to this court in a matter as this was trifling. In effect all that the appellant had to do was to file his summons again and by then he should be wary of using the offending cumulative word "and" between ground (a) and ground (b) in his summons, instead of wasting time and money on an appeal. The deminis principle therefore applies here.

(See also *Sambu (M) Sdn. Bhd. v. Stone World Sdn. Bhd.* [1990] 4 MLJ 129 and *Monatech (M) Sdn. Bhd. v. Jasa Keramat Sdn. Bhd. & Anor* [1999] 4 MLJ 629).

The defendant, in its application, had included para. (a) together with the other paras. (b), (c) and (d) of r. 19(1). As clearly stated in r. 19(2) on an application under para. (1)(a) **no evidence shall be admissible** (emphasis added). In this case the defendant had, not only filed an affidavit in support but also the statement of defence. Hence the prohibition contained in para. (2) of r. 19 had been breached. Such being the status of the procedural defects of the defendant's application it should automatically heed the advice given by the Court of Appeal in the *Pegasus* case. Instead of filing this appeal against the order of the learned senior assistant registrar the defendant should have straightaway filed a fresh summons in respect of the same application. In the circumstances and for the grounds as stated above I dismissed the defendant's appeal with costs.

I shall now deal with the appeal by the plaintiffs ie, the decision of the learned senior assistant registrar in rejecting the plaintiffs' 2nd preliminary objection. It was the contention of the plaintiffs that since the defendant had filed an unconditional appearance it had lost its right to make an application to strike out any writ and statement of claim on the ground of *locus standi* under O. 18 r. 19(1) of the Rules of the High Court 1980, based on Supreme Court decision of *Alor Janggus Soon Seng Trading Sdn. Bhd. & Ors. v. Sey Hoe Sdn. Bhd. & Ors* [1995] 1 CLJ 461. The relevant part of the decision of YAA Jemuri Serjan, CJ (Borneo) states:

> It was open to the Defendants to resort to O. 18 r. 19 or O. 33 r. 2 of our RHC but they chose not to do so but to bring up the *locus standi* issue on their appilcation to set aside the injunction. On this ground alone, this appeal should succeed. It is too late now for the Defendants to invoke O. 18 r. 19 because they must have filed their unconditional appearance, thereby depriving themselves of the right to invoke O. 18 r. 19 but it is still open to them to have recourse to O. 33 r. 2 if they so minded.

The first thing that needs to be determined is under which paragraph of r. 19(1) the issue of *locus standi* fall. When dealing with the issue of *locus standi* it actually concerns jurisdiction of the court. Hence it should fall under para. (a) of r. 19(1) which deals with "reasonable cause of action". When para (a) is involved then r. 19(2) has to be invoked. It states:

> (2) No evidence shall be admissible on an application under paragraph (1)(a).

Thus the application of para. (a) read together with the provision of r. 19(2) must be given different consideration from the other three paragraphs. In other words if the application under O. 18 r. 19 only involves para. (b) or (c) or (d) the applicant has no need to file a conditional appearance but if the application is in respect of para. (a) then by virtue of r. 19(2) the applicant must file a conditional appearance. I have already said that the issue of *locus standi* actually concerns jurisdiction and therefore is a subject matter that comes within the ambit of para. (a) of r. 19(1). The defendant in this case not only had filed an unconditional appearance but had also filed its statement of defence. In addition its application under encl. 10 was supported by an affidavit.

In my view what YAA Jemuri Serjan meant in his judgment in the *Alor Janggus* case when he referred to O. 18 r. 19 was actually referring to para. (a) of r. 19(1) because that is the only paragraph that concerns *locus standi* and jurisdiction and does not possibly fall under any of the other three paragraphs.

In the light of the above if an application to strike out a writ under O. 18 r. 19 on the ground of jurisdiction is made the applicant must enter a conditional appearance. However there are exceptions to this rule. Such exceptions had been discussed by Lai Kew Chai J in the Singapore case of *"The Avro International", "The Avro Adventure", "Avro International" (Owners of) v. Arabian Marine Bunkers Sales Co. Ltd. & Anor* [1988] 1 MLJ 147. The learned judge in his judgment said:

> The effect of an unconditional appearance is twofold: (1) it waives any irregularity of the writ or its service; and (2) the Defendant is considered to have submitted to the jurisdiction of the Court: see vol. 1 *The White Book* 1979 Ed. para. 12/1/3. A Defendant who wishes to set aside the writ or its service for non compliance of the rules of procedure or who wishes to challenge the jurisdiction of the court must therefore file a conditional appearance.

In his judgment Lai Kew Chai J however, recognised the existence of an exception to the general principle. He said:

> The one exception from the general effect of the unconditional appearance is the situation where a court under any written law lacks jurisdiction to entertain the claim at all, as in *Wilkinson v. Barking Corporation.* There, the Defendant was allowed to assert the want of jurisdiction of the court although he had entered an unconditional appearance because a statutory tribunal and not the court was vested with the jurisdiction to entertain the claims of superannuation such as the one asserted by the Plaintiff. An exception to the effect of an unconditional appearance was made in that case because the court would otherwise have entertained the claim to the contrary.

In the case of *YAM Tengku Iskandar ibni Almarhum Tengku Ahmad v. Majlis Perajaan Negeri Kelantan & Satu Lagi* [1998] 1 CLJ Supp 416, which was heard before me, on an application by the defendant strike out the writ and statement of claim under O. 18 r. 19 of the Rules of High Court on the ground of jurisdiction the counsel for the plaintiff raised a preliminary objection because the defendant had entered an unconditional appearance. However in my judgment, I came to the conclusion that this case fell within the exception to the general effect of unconditional appearance because the plaintiff's assertion was a matter which the court had no jurisdiction to hear as such matter would fall within the jurisdiction of Majlis Perajaan Negeri Kelantan. As such I dismissed the plaintiff's preliminary objection and allowed the defendant's application.

In this instant application before me the defendant had entered an unconditional appearance. It now applied to strike out the writ and statement of claim under O. 18 r. 19 Rules of High Court and it must fall under para. (a) since the issue is on *locus standi* which in fact concerns the jurisdiction of the court. In order for the defendant to succeed in an application under O. 18 r. 19(1)(a) Rules of High Court after having entered an unconditional appearance it must come within the exception as stated in the case of *Wilkinson v. Barking Corporation.* But based on the facts of this case I was unable to conclude that it could come within the exception because the plaintiffs' assertion was a matter which this court would have jurisdiction. In the case of *YAM Tengku Iskandar* the court did not have jurisdiction to hear the case since the appropriate forum to hear the assertion would be the Majlis Perajaan Negeri Kelantan. Therefore this instant case was clearly distinguished from the case of *YAM Tengku Iskandar.*

For the reasons as I have stated above I allowed the plaintiffs' appeal with costs. In the light of this ruling it would no longer be open for the defendant to file afresh this application as granted by the learned senior assistant registrar. To that extent the ruling of the senior assistant registrar is set aside.